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IN THE

Supreme Court of the United States

October Term, 1946.

No. **313**

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.*
ROMAN J. MARCINKOWSKI,

Petitioner,

against

WILLIAM B. MARTIN, Warden of Attica State Prison,
Attica, New York,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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**BRIEF IN OPPOSITION TO PETITION
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Statement

The petitioner prays for a writ of certiorari to review an order of the Special Term of the Wyoming County Court of the State of New York dated November 5, 1945. Said order dismissed petitioner's writ of habeas corpus and remanded him to the custody of respondent as Warden of Attica State Prison.

Petitioner appealed from the order of the Wyoming County Court to the Supreme Court of the State of New

York, Appellate Division, Fourth Judicial Department, by service of a notice of appeal on respondent on November 26, 1945.

There has been no determination of said appeal on the merits by the Appellate Division of the Supreme Court, and such appeal is still pending.

By order dated January 9, 1946, the Appellate Division of the Supreme Court, Fourth Judicial Department, denied petitioner's motion for leave to appeal to that Court as a poor person on handwritten papers, on the ground that there was no merit to petitioner's appeal. A motion to the Court of Appeals of the State of New York for leave to appeal from said order of the Appellate Division of the Supreme Court, Fourth Department, was dismissed on March 7, 1946, on the ground that no appeal lay to that Court from such order of the Appellate Division of the Supreme Court denying leave to prosecute an appeal as a poor person, as that order did not finally determine the proceeding within the meaning of the New York State Constitution. On May 7, 1946 the Appellate Division of the Supreme Court, Fourth Department, denied an application by relator for "a writ of certiorari," and on June 13, 1946, the Court of Appeals of the State of New York dismissed another motion by relator requesting leave to appeal to that Court.

Facts

Petitioner was convicted in the Supreme Court of the State of New York, in and for the County of Erie, of the crime of second degree murder on September 26, 1935, and was sentenced to a definite term of thirty-five years in prison as a second felony offender. On May 15, 1942, it appearing that petitioner erroneously had been given a

definite sentence rather than an indeterminate sentence, petitioner was resentenced to a term of from twenty years to life, which term he is now serving in Attica State Prison, Attica, New York.

The sole contention upon which petitioner's petition for a writ of habeas corpus was based was that his conviction was not valid because he was not arraigned before a magistrate prior to his arraignment after his indictment.

ARGUMENT

As a matter of law petitioner is not entitled to a writ of certiorari.

This Court may review upon a writ of certiorari a final judgment or decree in any suit "in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a suit of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity * * *." (28 U. S. C. § 344).

Petitioner prays for a writ of certiorari to review an order of the County Court of the State of New York, which court is not the highest court of the State of New York. Nor does there appear to be any federal question involved over which this court can take jurisdiction.

The petitioner, as a matter of right, may appeal from the order of the Wyoming County Court of the State of New York to the Appellate Division of the Supreme Court of the State of New York (N. Y. Civil Practice Act, § 1274). Such an appeal has been taken and is now pending.

CONCLUSION

It is respectfully submitted that the petition be dismissed.

Dated, August 20, 1946.

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